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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 8

DAVID H. RYAN, *Appellant*,

vs.

THE STATE OF WASHINGTON, *Appellee.*

DAVID H. RYAN, *Appellant*,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON, HAROLD H. HENNEFORD, THOMAS S. HEDGES, and T. M. JENNER, Constituting the Tax Commission of the State of Washington, *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

G. W. HAMILTON,
Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

Attorneys for Appellees.

Office and Postoffice Address: Temple of Justice, Olympia, Washington

STATE PRINTING PLANT, OLYMPIA, WASH.

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No. 774

DAVID H. RYAN, *Appellant,*

vs.

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STATEMENT OF THE CASE

Appellant claiming immunity from the occupational tax of the State of Washington contained in chapter 191, Laws of 1933, as amended by chapter 57, Laws of Washington, Ex. Sess. of 1933, has appealed from a denial of this immunity by the

supreme court of the state in two cases here consolidated for argument.

The first of these cases is an appeal from an order of the Tax Commission of the State of Washington, holding appellant to be taxable with respect to his contracting business, under the general provisions of chapter 57, Laws of Washington, enacted at the Extraordinary Session of 1933, and with respect to his mercantile business as a retail merchant under section VII, subsection (d) of chapter 191, Laws of 1933, page 873. The trial court sustained the order of the tax commission and the supreme court sustained the judgment of the trial court.

The second case was filed to restrain the collection of the same occupational tax from appellant with respect to his contracting business, in the construction of a railroad 30 miles in length from the city of Odair, Washington, to the site of the Coulee project.

In neither case does appellant claim to be a governmental instrumentality nor seek exemption as an agent of the Federal government. Unlike the contractors in the case of *Silas Mason Co., Inc. v. State Tax Commission*, No. 773, October Term, 1936, in this court, appellant admits that he is an independent contractor not entitled to the immunity from state taxation enjoyed by the Federal government, and relies solely on the claim that both his

contracting and mercantile businesses were conducted entirely outside of the State of Washington.

The history of the Coulee Dam project is given in appellee's brief in Cause No. 773, which will be argued with this case and this will not be repeated.

It must be borne in mind, however, that this project was started as a state project for the irrigation and reclamation of arid lands, and the production of power, and that the Federal government allocated relief monies to the project under the N.I.R.A. without specific act of Congress until long after appellant's contract had been performed and that there has been no effort on the part of the Federal government to establish any reservation.

ARGUMENT

Appellant contends that the lands acquired for the Coulee Dam project were acquired by purchase for one of the purposes within article 1, section 8, clause 17 of the Federal Constitution, with the consent of the state and that, therefore, Federal jurisdiction is exclusive in such area for all purposes.

In the event the court should find that the Coulee Dam project does not constitute "other needful buildings" within the provisions of article 1, section 8, clause 17 of the Federal Constitution, counsel for appellant argues that the United States still is a purchaser of the land with the consent of the state and that the state has ceded its jurisdiction so that in any event the property being used for the Coulee Dam project is outside of the State of Washingon and no state tax can therefore be valid in that area.

These arguments are advanced without a close examination of the facts as applied to the statutes of Washington and the cases construing them, an examination of which will show that the Federal government is simply exercising concurrent jurisdiction with the State of Washington and has required that appellant submit to the jurisdiction of the State of Washington.

APPELLANT'S FIRST CONTRACT WAS PERFORMED OUTSIDE OF COULEE DAM AREA

Appellant performed the first contract by subletting the same from his office, which he maintained in the Davenport hotel in the city of Spokane, Washington, which is, of course, outside of the Coulee Dam area. (R. 11.) He was subject to the jurisdiction of the courts of this state and indeed was sued in respect to the performance of this identical contract in the superior court of Spokane county.

The case was appealed to the supreme court and the decision will be found reported in 183 Wash., at page 590. Appellant's opening brief in that case was prepared by counsel who now represent him in the instant cases, and contains the following excellent statement of the manner in which appellant conducted his contracting business:

"* * * Appellant was the lowest bidder for this work, and the contract was thereafter let to him. The work consisted of moving one million cubic yards of overburden on each side of the Columbia river from the respective ends of the proposed dam, being a necessary preliminary to the actual construction work. The work was performed by excavating the overburden with power shovels and hauling it with dump trucks to the designated spoil banks or dumping places, about twenty-five hundred feet up river from the damsite. *The work was all performed by appellant through subcontractors;* the west side, called in the contract schedule No. 1, being let to Goodfellow Brothers, a corporation; while on the east side, called schedule No.

2, the excavation, generally referred to as the lefting or loading, was contracting to M. S. Ross, and the hauling contract was let to McCutchen Transportation Company. There was also one other small subcontract on the east side, which has no bearing on this case and which will not be further referred to." (Italics ours.)

If we concede for the sake of argument that the Coulee Dam area was under the exclusive jurisdiction of the Federal government, still appellant would have been taxable inasmuch as he transacted some business on an area of the state outside of the Federal reservation.

Ohio River Contracting Co. vs. Gordon, 244 U. S. 68;

Sollitt & Sons Construction Company vs. Commonwealth (Va.), 172 S. E. 290.

But it cannot be conceded that there is any Federal reservation over which the Federal government could have exclusive jurisdiction and it is submitted that the contractors are taxable with respect to both their contracting business and their mercantile business.

APPELLANT'S CLAIM OF IMMUNITY FROM STATE TAXATION NOT SUPPORTED BY THE FEDERAL GOVERNMENT

As pointed out by the supreme court of the state, this is not a question between the Federal government and the state as to jurisdiction. Both governments are actually exercising concurrent jurisdiction.

Appellants attempt to avoid the payment of taxes to the State of Washington which are imposed upon all engaged in the contracting business and for this purpose alone argue that the Coulee Dam area, of whatever size it may be, is outside of the State of Washington.

Appellant's contract does not authorize it to represent the Federal government in seeking immunity from state taxation. As this court said in *State v. Wiles*, 116 Wash. 387, at page 392, under these circumstances, it must be presumed that it was the intention that the contractor should be governed by the laws of the state.

In the case at bar, however, the Federal government has specifically provided that the contractor shall be subject to the jurisdiction of the state.

Appellant is afforded protection in his civil affairs by the State of Washington alone. His attempt is to enjoy the protection which the state affords those doing business within its borders without assuming the obligation of paying for that protection.

Were this attempt to succeed, the many residents of the area adjacent to Coulee Dam would be disenfranchised and both the state and Federal governments seriously embarrassed.

We approach the question from the standpoint of both governments that relinquishment of the power to tax is never to be assumed (*Trimble v. Seattle*, 64 Wash. 102); that tax exemptions are not to be extended by judicial construction (*Thurston County v. Sisters of Charity*, 14 Wash. 264), and that when the Federal government acts under the authority of the commerce clause for improvement of navigation, it does not divest the state of exclusive jurisdiction and its sovereign power over lands used in connection with such improvements.

THE FEDERAL GOVERNMENT DOES NOT ACQUIRE EXCLUSIVE JURISDICTION OVER LANDS USED IN PROJECTS FOR THE AID OF NAVIGATION

While the project in the case at bar was first granted relief monies by the Federal government to aid unemployment and while it is primarily an irrigation or power project, counsel for appellant seem to feel that their case stands on a better footing if the project is treated as one in aid of navigation solely.

While this is ordinarily a Federal function, Congress may consent to the improvement of navigation by the state and a contribution in aid of the project is sufficient consent.

Huse vs. Glover, 119 U. S. 543;
Harmon vs. Chicago, 147 U. S. at 409.

The dam itself rests upon the bed and shores of a navigable river in the State of Washington and

title to the land underlying the said river is, of course, in the State of Washington in trust for public uses.

The supreme court of the state of Oregon pointed this out very clearly on rehearing the case of *Atkinson vs. State Tax Commission of Oregon;* in an opinion handed down April 6, 1937, and reported in the Oregon Advance Sheets, volume 24 at page 535.

The supreme court of Oregon in that case held that the contractors constructing the Bonneville dam across the Columbia river under contract with the War Department as an aid to navigation, were subject to be taxed by the state of Oregon and repulsed the argument that the area was under the exclusive jurisdiction of the Federal government.

In the Oregon case, as in the case at bar, a general statute of consent and cession of jurisdiction was relied upon by the contractors. Inasmuch as this opinion may not be readily available, the following rather lengthy quotation from the majority opinion may be helpful:

"Both channels of the Columbia river within the Bonneville dam project are navigable waters. And since they are navigable, the soil underneath them below ordinary high-water mark within the territorial limits of the state of Oregon belongs to this state: *State v. Imlah*, 135 Or. 66 (294 P. 1046); *Cook v. Dabney*, 70 Or. 529 (139 P. 721); *United States v. Utah*, 283 U. S. 64 (75 L. Ed. 844, 51 Ct. 438); *Pollard's Lesse v. Hagan*, 3 How. 212

(11 L. Ed. 565); *Shivley v. Bowlby*, 152 U. S. 1 (38 L. Ed. 331, 14 S. Ct. 548).

"The title to lands under the water of these channels within the territorial limits of the state of Oregon has not been acquired by the federal government from the state of Oregon by purchase, condemnation or otherwise. Nor has the state of Oregon ceded to the national government exclusive legislative jurisdiction over the waters of these channels.

"In *United States v. Bevans*, 3 Wheat. 336 (4 L. Ed. 404), a question arose as to whether the state of Massachusetts or the United States had jurisdiction over a crime committed on a warship "lying at anchor, in the main channel of Boston harbor." In his opinion therein, at page 385, Chief Justice Marshall said:

'What then is the extent of jurisdiction which the state possesses? We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power. The place described is unquestionably within the original territory of Massachusetts. It is, then, within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States.'

* * * * * *

"In *Middleton v. La Compagnie General Transatlantique*, 100 Fed. 866, the circuit court of appeals for the second circuit had before it the question of whether an administrator could maintain an action for damages sustained by the widow and next of kin in the case of a death due to negligence at a place in the harbor within three-fourths of a mile of Sandy Hook. The court, after pointing out that there could be no recovery in a court of admiralty under the general martime law for loss of life, stated that it must be shown that the accident happened at a place within the legislative jurisdiction

of some state whose law permits such recovery. The court predicted its conclusion in the case on the assumption, as contended for by the plaintiff, that the United States purchased "the island or cape of Sandy Hook from shore to shore, bounded on all other sides (than the south) by the sea and Sandy Hook bay.

"It was there held, however, that in purchasing this property the United States did not obtain any land below low-water mark. The court said:

'The purchase, if there was a purchase, and the act of concession, if it be susceptible of a construction which will bring it into harmony with the constitution, and thus make it a valid "Consent to the purchase," gave to the United States the right to exercise exclusive legislative jurisdiction only in so much of the state of New Jersey as was to be transferred. Over all other places within the limits of that state her legislative power remains as full and complete as it was before, except that it must be so exercised as not to destroy or impair the forts, arsenals, and other structures erected on the land transferred to the federal government for military or public purposes. The accident happened, as we have seen, upon inland waters which were within the limits of the state (conceded to be so by the neighboring state and by the United States) before the act of cession; and, since that act does not purport to transfer the locality in question, the public laws of New Jersey are in full force there, and were so at the time of the accident.'

"The above case was cited with approval by the supreme court of the United States in *Hamburg-American Steamship Co. v. Grube*, 196 U. S. 407, 415 (49 L. Ed. 529, 25 S. Ct. 352), in the following language:

'Moreover, as was held by the circuit court of appeals for the second circuit, in *Middleton v. La Compaignie Generale Transatlantique*, 100 Fed.

Rep. 866, the act did not purport to transfer jurisdiction over the littoral waters beyond low water mark, and for the purposes of this case the public laws of New Jersey must be regarded as obtaining there, whether enacted prior or subsequent to the cession.'

"In the case of *Bigelow v. Nickerson*, 70 Fed. 113, the circuit court of appeals, seventh circuit, had before it the question of whether a statute of Wisconsin giving the right of recovery for death from injury applied to a death which occurred on the waters of Lake Michigan. It was contended that the law was in conflict with the provisions of the constitution of the United States granting to Congress the power to exclusive legislation in all cases of admiralty and maritime jurisdiction. In holding that the Wisconsin act was not violative of this constitutional provision the court said:

'In the case of *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110, and in the case of *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, it is said to be the settled law of this country that "ownership of, and dominion and sovereignty over, lands covered by tide waters or navigable lakes, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be without substantial impairment of the interest of the public in such waters, and subject to the paramount rights of Congress to control their navigation, so far as may be necessary for the regulation of commerce." In the latter case it is said (page 58, 152 U. S., and page 548, 14 Sup. Ct.) that, upon admission of states into the Union, the "administration and disposition of the sovereign rights in navigable waters, and in the soil under them," passed to the control of the states within whose boundaries such waters were included. See, also, *Mann v. Land Co.*, 153 U. S. 273, 14 Sup. Ct. 820.

'The grant to the United States, in the constitution, of all cases of admiralty and maritime jurisdiction, does not extend to a cession of the waters in which those cases may arise, or of general jurisdiction over them. *Congress may pass all laws which are necessary for giving the most complete effect to the exercise of the admiralty and martime jurisdiction granted to the government of the Union, but the general jurisdiction over the place, subject to this grant, adheres to the territory, as a portion of territory not yet given away, and the residuary power of legislation will still remain in the state. U. S. v. Bevans*, 3 Wheat. 336. We are therefore of the opinion that the surrounding states, within the limits prescribed in their respective organic acts, have sovereign rights in and over the navigable waters of Lake Michigan, subject to the paramount right of the federal government to regulate navigation and commerce between the states and with foreign nations. *The right of the state to legislate and to enforce its laws is plenary, within the boundaries prescribed, limited and controlled only by the paramount laws of the nation. There does not necessarily result any conflict. Both jurisdictions can coexist in the same plane in complete harmony.*' (Italics supplied.)

"After discussing further the jurisdiction of courts of admiralty, the opinion thus continues:

'We think the clear result of the authorities to be that the sovereignty of the state of Wisconsin extends to the middle of the lake, and that its laws, so far as they do not conflict with the laws of the United States passed in the regulation of commerce and of navigation, are operative within its prescribed boundary.'

"*Stockton v. Baltimore & N. Y. R.*, 32 Fed. 9, was an action brought on behalf of the state of New Jersey in the name of its attorney general. A question there arose as to the right of the Staten Island Rapid Transit Railroad Company, under permis-

sion granted by Congress to said company and the named defendant, or either of them, to erect a bridge 'across Arthur kill, between New Jersey and Staten island, in the state of New York, upon the lands of the state (of New Jersey) situate on the shore, and under the waters of said kill,' to proceed with the construction of such bridge without the consent of the state of New Jersey and without compensating that state for taking the bed of the stream on which the bridge supports were to be placed. The opinion in the case was written by Justice Bradley, a member of the United States supreme court sitting as a circuit judge.

* * * * * *

"It was also urged by the petitioner therein that the state could be ousted by the federal government of exclusive jurisdiction over the area included in the bridge project only by purchase of the land by the government with the consent of the state or by cession by the state of jurisdiction over the same. The court answered this argument by saying that the state itself can not by refusing to give its consent prevent the federal government from carrying out its constitutional functions. In further answer to the above contention, after referring to the provisions of the federal constitution hereinabove quoted, the court observed:

'It is argued that this is the only constitutional method by which the United States government can obtain the possession and use of lands within a state, especially of lands belonging to the state.

'The argument, however, is directed to the acquisition of territory, with exclusive jurisdiction over the same, and is entirely sound in that regard. But it does not touch the question as to the power of the United States to acquire the mere use of the land without exclusive jurisdiction therein. Nearly all the powers of government are exercised over territory in which the United States and the several

states have concurrent jurisdiction. *It is only in exceptional cases that the United States desires to have exclusive jurisdiction, and a consequent cession of territory.* It is very true that the consent of the state legislature is required in order to give the United States this exclusive jurisdiction. But that is all. It is not required when exclusive jurisdiction is not sought. On the contrary, the government, if it sees fit, may condemn land for its purposes without the consent of the state. Thus it was decided by the supreme court in the case of *Kohl v. U. S.*, 91 U. S. 367, that the government of the United States may exercise the right of eminent domain within a state, for the purpose of condemning land for the use of a post-office building, and may, for this purpose, resort to its own courts. In such a case, there can not be a doubt that the post-office building could be erected and used by the government without asking the consent of the state legislature. Such consent would, indeed, be necessary to vest in the United States exclusive jurisdiction over the post-office building and grounds; but it would not be necessary to enable the government to use the property for the purpose for which it was acquired. *And so of any other property wanted for a public purpose; the consent of the legislature is not necessary to its acquisition, or to its use; but only to the exclusion of state jurisdiction over the place.* That jurisdiction, if allowed to remain, will extend to the punishment of crimes committed against state laws therein, and to the service of state process, but, of course, can not interfere with the execution of the United States laws, nor with the performance, by United States officers and agents, of the duties devolved upon them.' (Italics supplied.)

"In *United States v. Utah, supra*, the court said:

'The government also refers to proceedings since Utah became a state, with respect to governmental

investigations, operations under placer claims, and withdrawals for power and reservoir sites. It is not necessary to review these transactions in detail, as nothing that has been done alters the essential facts with respect to the navigability of the streams, and the United States could not without the consent of Utah, divest that state of title to the beds of the rivers which the state had acquired. Nor has Utah taken any action which could be deemed to estop the state from asserting title.

* * * * * * *

"No authority has been called to our attention to the effect that the state of Oregon has in any way relinquished its sovereignty over the area occupied by the waters of Bradford slough and that part of the north channel of the Columbia river which is within the territorial limits of the state. The whole contention of the plaintiffs seems to be based upon the well recognized rule that the federal government has exclusive power to regulate commerce, and that such power extends to control of navigable waters of the country, to the lands beneath them, and to the erection of bridges, piers and all other instrumentalities of commerce which in the judgment of Congress may be necessary or expedient for the exercise of this power. *Such paramount authority, however, does not give to the federal government exclusive jurisdiction except in matters relating to the regulation of commerce and navigation, and the state is free to exercise exclusive legislative jurisdiction in all other matters within its territorial boundaries, except in such instances as it has in some manner relinquished jurisdiction.* (Italics ours.)

"It is therefore apparent that the state of Oregon has power to tax any personal property belonging to private individuals located on any of the navigable waters within the Bonneville dam project inside the exterior boundaries of the state. Like-

wise, any other power of taxation which the state has would be effective within that area.

"The plaintiffs place much reliance upon the case of *United States v. Tucker*, 122 Fed. 518, in which it was held by the United States district court that a dam was a 'needful building' within the meaning of the provision of the national constitution hereinabove quoted. The question there involved was raised by demurrer to an indictment which charged the defendant with a crime committed on lands owned by the United States and known as lock No. 3 on Green river in the state of Kentucky. The court pointed out that the place where the criminal acts were alleged to have been committed 'was on land then used for public purposes; that the state's interest in the land had been ceded to the United States by the legislature of Kentucky under an act approved February 20, 1886 (1 Sess. Acts 1885-1886, p. 11, c. 69); and that in addition to this legislature of the state had, by the same enactment, in express terms, yielded to the United States jurisdiction over it.' No such consent was given in the instant case or cession made by the state of Oregon of jurisdiction over the navigable waters involved in this litigation.

"*Most of the foregoing discussion has been limited to the area not purchased by the federal government. In that area, however, the main structural part of the works is to be located. Even assuming that the construction in the Bonneville dam project may be classified as a 'needful building,' nevertheless only a small part of it is located on lands purchased by the federal government.* (Italics ours.)

"To erect and maintain a structure such as the Bonneville dam, the declared purpose of which is to develop hydro-electric power and to aid navigation, does not necessitate the United States government's having exclusive jurisdiction over the site of con-

struction. Such a project differs materially from 'forts, magazines, arsenals' and similar structures, which by their very nature demand that the federal government have exclusive jurisdiction over them.

"It has already been pointed out that the federal government may acquire by purchase, condemnation or otherwise, lands within the state, without the consent of the state, for governmental purposes, and that in many instances the federal government does not desire to exercise exclusive jurisdiction over the land so acquired. The mere fact that there may be on the statute books of the state a general law, such as sec. 601303, Oregon Code 1930, consenting to the purchase of land by the United States and granting to the national government the right to exercise exclusive jurisdiction thereover, does not imply that over all lands purchased by the national government in the state after the enactment of such law the state is divested *ipso facto* of sovereignty, and exclusive control over the acquired area is assumed by the federal government. *In the instant case there is nothing to indicate that the federal government desires to exercise exclusive legislative jurisdiction over the land purchased by it within the Bonneville project. It would be somewhat inconsistent to assume that since it does not have such jurisdiction over the major part of the structures which are now being built, the federal government is seeking to exercise exclusive jurisdiction over that part of the works located on lands title to which it has acquired.* (Italics ours.)

* * * * * *

"We conclude that the federal government has not acquired, nor is it assuming, exclusive legislative jurisdiction over any of the area within the Bonneville project inside the territorial limits of the state of Oregon, and that the plaintiffs are amenable to the laws of this state relative to taxation on personal income earned within the state."

The following quotation from the opinion of Mr. Justice Bradley in *Stockton vs. Baltimore Railroad Company*, 32 Fed. 9, has been often quoted with approval:

"Nearly all the powers of the government are exercised over territory in which the United States and the several states have concurrent jurisdiction. It is only in exceptional cases that the United States desires to have exclusive jurisdiction, and a consequent cession of territory." (Italics ours.)

Notwithstanding this Oregon case counsel for appellant argue that the Federal government has acquired more than concurrent jurisdiction over lands which it purchased in connection with the Coulee project.

In fact, they seek to liken these lands to the reservation at Fort Lewis, where there was an express cession of exclusive jurisdiction over particular lands for purposes of a fort and where the Federal government accepted this exclusive jurisdiction, and (acting under authority conferred by act 1, section 8, clause 17, of the Federal Constitution) was actually maintaining a fort on the area for the support of the government.

United States v. Tucker, 122 Fed. 518, is the only case relied upon as holding that locks and dams are "needful buildings" within the meaning of the constitutional provision above cited. But that was a criminal case arising on demurrer to the indictment charging a crime under a Federal statute and presented by the United States Attorney. The

state's sovereign power of taxation was not involved. The indictment (which for purposes of the demurrer was taken to be true) charged that the "place" where the crime was committed was within the "exclusive jurisdiction" of the United States (both by consent and purchase and by express cession describing the lands).

The court stressed the fact that the government was actually using and governing the lands and that Congress had legislated with respect to crimes committed thereon.

It will be seen that the district judge, in overruling the demurrer, did so because the indictment made out a *prima facie* case; the rule being that such a serious question as "exclusive jurisdiction" should not be summarily disposed of.

Rodman v. Pothier, 264 U. S. at 402.

It must be pointed out in passing that crimes committed in the Coulee Dam area are in fact prosecuted in the state courts and that the Federal authorities have never assumed any of this burden.

In the *Tucker* case the land on which the structure was erected was being maintained for the permanent use of the government. In the case at bar, the government, at most, is simply aiding in the construction of a state project, essentially private in its nature.

In the *Tucker* case, the *government, itself, was claiming jurisdiction* and was actually exercising it.

In the case at bar, the contractor is attempting to make the claim of jurisdiction for the government. The government does not claim jurisdiction and by its contract it has required appellant to submit to the jurisdiction of the state.

If the decision of the district judge on the demurrer in the *Tucker* case is to be taken as a ruling on the authority of the Federal government to assume exclusive jurisdiction over lands purchased in connection with the exercise of powers conferred by the commerce clause, it is out of harmony with all of the decisions which have considered the matter, when involving the power to tax.

However, the question of exclusive jurisdiction was not involved in the *Tucker* case, and what was said by the district court on that question was wholly unnecessary to the disposition of the case. While such expressions may be respected, they do not control when the precise point has been presented for decision.

Brush vs. Commissioner of Internal Revenue,
81 Sup. Ct. Advance Opinions (L. Ed.)
No. 10 at page 451.

THE FEDERAL GOVERNMENT DOES NOT ACQUIRE EXCLUSIVE JURISDICTION OVER LANDS USED FOR IRRIGATION, RECLAMATION OR POWER PROJECTS

As a matter of fact, the present project is both a reclamation and irrigation and a power project. It is hoped that the sale of power will defray its

cost. Inasmuch as it is an irrigation and reclamation project, the work is being done under the direction of the Bureau of Reclamation rather than under the War Department as in the case of the Bonneville dam involved in the Oregon case of *Atkinson vs. State.*

Production and sale of electrical energy is, of course, a power reserved to the state and while title to lands in reclamation districts may nominally be in the United States, the state itself has been given jurisdiction to provide for the appropriation and use of the water in connection with the reclamation of such lands.

Brush vs. Commissioner of Internal Revenue, 81 Sup. Ct. Adv. Ops. (L. Ed.) No. 10, at 448;

Twin Falls Co. vs. Caldwell, 266 U. S. 85;

California-Oregon Power Co. vs. Beaver Portland Cement Company, 295 U. S. 142.

The case of *Six Companies vs. DeVinney,* 2 Fed. Supp. 693, is one of the earliest cases in which contractors engaged in the performance of public works contracts sought to escape state taxation by taking advantage of a general act consenting to the purchase of lands by the Federal government.

The case was very carefully considered and the opinion of the district court has been uniformly followed. The contractors were held to be taxable even though there had been some effort made to establish a *bona fide* reservation.

Six Companies were the contractors for the construction of the Boulder Canyon project. Unlike the case at bar, Congress had established what is known as the Boulder Canyon Project Federal Reservation. The state of Nevada had by general act, consented to the acquisition of land by the Federal government " * * * for sites for customs houses, court houses, forts or arsenals or other public buildings whatever, or for any other purpose of the government * * *."

The act of cession provided for exclusive jurisdiction for all purposes excetp the services of process, and provided that as long as the lands remained the property of the United States, they should be free from state and county taxes. The act required the filing of an accurate description and plat with the governor of the state. This was done and both the governor of the state of Nevada and the Federal officials treated the Federal Reservation as under the exclusive jurisdiction of the Federal government.

An act of Congress provided that the project was for the purpose of controlling floods, improving navigation, providing for reclamation of public lands and for the generation of electrical energy. It is, also, provided that the title to the dam, reservoir, plant and incident works, should forever remain in the United States and created a reservation.

The Secretary of Interior, in filing the plat, made his affidavit that it was a true representation of the area constituting the Boulder Canyon Federal Reservation of the United States, in Nevada. The description showed that the reservation contained certain lands held in private ownership.

In filing the plat and description, the Secretary of the Interior advised the Governor of the state that he did so pursuant to the 17th clause of article 1, section 8, of the Federal Constitution authorizing Congress to take and exercise jurisdiction.

The *Six Companies* case therefor, presents a much stronger case for exemption from state taxation, for there was an assumption of jurisdiction by the Federal government under an express act of Congress, while in the case at bar, there is no reservation, no congressional authority, and no attempt to exercise jurisdiction on behalf of the Federal government.

In the *Six Companies* case, as in the case at bar, the dams are being constructed in the beds of navigable rivers, title to which is in the state, subject to the right of the Federal government to use the same.

In denying immunity from state taxation in the *Six Companies* case, the Federal judge said:

"* * * Assuming that the said dam, power plant, and appurtenant works are within the meaning of the expressions in the state statute, 'other public buildings, whatever, or for any other purpose

of the government,' the question is presented whether the filing of a plat which is not only inclusive of such dam, plant, and appurtenant works, but is also inclusive of more than a hundred square miles of adjacent territory, is within the meaning of the provisions of the state statute.

"Statutes relinquishing jurisdiction are strictly construed. A controlling reason for such construction is that it is a matter of the very greatest importance to both the national and the state governments affected. *Larson v. South Dakota*, 278 U. S. 429, 49 S. Ct. 196, 73 L. Ed. 441."

Construing the state act, the Federal court said on page 698:

"*All the purposes specifically mentioned in section 1 of the state act refer to public buildings of a character the use of which would either be permanent or for an indefinite period of time, as distinguished from a mere incidental purpose manifestly of short duration.* The expression in the statute, 'for any other purpose of the government,' is governed by the rule *ejusdem generis*, and likewise refers to a purpose either of indefinite duration or of a permanent character.

* * * * * * *

"* * * *It is clear that the state act does not contemplate a ceding of jurisdiction over a site the use of which is not* only temporary but incidental to some other purpose. * * *" (Italics ours.)

Referring to the reclamation law under which the Secretary of the Interior is authorized to act on irrigation projects, the court further said:

"This law comprehends the acquisition by citizens of the United States of the land and water rights. *The law generally comprehends that its purposes will be carried out under national direc-*

tion, but, subject thereto, always without relinquishment of state jurisdiction. * * *" (Italics ours.)

The contractor was held to be taxable by the state in this case, notwithstanding the fact that the work was done under an express act of Congress, which was sustained in *Arizona v. California*, 283 U. S. 423, cited by appellant. The trial court correctly applied the principles laid down in these controlling decisions.

Nikis v. Commonwealth, 131 S. E. 236, is entirely in point as to the mercantile business conducted by appellant.

In that case, the supreme court of appeals of Virginia, had to deal with a mercantile establishment located on lands purchased by the Federal government with the consent of the state of Virginia, to be used for the approach to a bridge across a navigable river. It was there contended, as it is here, that the state of Virginia had divested itself of its sovereign rights. In disposing of this contention, the court said:

"That a bridge is not a building has been frequently decided, and it seems hardly necessary to say that an approach to a bridge which is a public highway is not a building.

"*In order to accord immunity from state taxation, the accused must not only sho wthat the land is acquired by the United States, but also that it is for one or more of the purposes so clearly indicated in article 1, section 8, clause 17, of the Constitution.* We are clear in our view that he is not entitled to any such immunity.

"It is suggested in the brief for the accused that the sole test is whether or not the land has been acquired in the manner referred to in the clause cited; that is over 'places purchased by the consent of the Legislature of the state in which the same shall be.' Clearly, however, this is not the sole test, *because it is manifest that the land must also be acquired for one of the specific purposes which are indicated in the clause, namely, for a fort, magazine, arsenal, dockyard, or other needful building.*" (Italics ours.)

THE STATE HAS NEITHER CONSENTED TO THE ACQUISITION OF TITLE TO THE COULEE DAM AREA NOR CEDED EXCLUSIVE JURISDICTION OVER THE SAME TO THE FEDERAL GOVERNMENT

Counsel for appellants rely upon one general statute of the State of Washington in order to make a claim that the state has consented to the purchase of the lands necessary for the Coulee Dam project or has ceded exclusive jurisdiction. All other statutes are ignored.

In the first place there are two general acts in this state whereby the state gave its consent to the purchase of property in the State of Washington by the Federal government. Both are limited to the situations where Congress is granted authority to exercise exclusive legislation by the following words, "* * * * the consent herein and hereby given being in accordance with the provisions of the 17th Clause of the 8th Section of the 1st Article of the Constitution of the United States, and with the acts

of Congress in such cases made and provided. * * *"

The first of these acts is the act of January 23, 1890, to be found on page 459 of the Session Laws for the years 1889 and 1890. Attached hereto is Appendix "A".

In this act the consent granted by the state is qualified by the proviso:

"* * * *Provided*, that a sufficient description by metes and bounds and an accurate plat or map of each such tract or parcel of land be filed in the proper office of record in the county in which the same is situated. * * *"

The plat or map required to be filed is a map showing the extent of the reservation over which the Federal government is assuming jurisdiction.

Construing such limited and qualified consent, in the case of an express grant of the property ceded for Fort Lewis, the circuit court of appeals for the first circuit said in *Pothier v. Rodman*, 291 Fed. at page 318:

"*It is apparent that this section* read in the light of the surrounding circumstances, *means that the sovereign right of the State of Washington over the land in question and the acquisition of exclusive legislative authority and jurisdiction by the United States thereover was not to take place when the land had been conveyed by deed, but only when, upon such conveyance being concluded, a sufficient description by metes and bounds and an accurate map of each such tract or parcel of land*, together with copies of orders, deeds, patents and other evi-

dences of title, *had been filed for record in the auditor's office of Pierce county.* * * *" (Italics ours.)

In the same case, the court ably stated the reasoning underlying the decision in *Ft. Leavenworth v. Lowe*, 114 U. S. 525, as follows:

"* * * The court also recognized in its opinion that the right of sovereignty of a state over land purchased by the United States within its boundaries was not to be taken away by implication; that the essence of the provision of the Constitution here under consideration was '*that the state shall freely cede the particular place to the United States for one of the specific and enumerated objects.* This jurisdiction cannot be acquired tortiously or by disseizin of the state; much less can it be acquired by mere occupancy, with the implied or tacit consent of the state, when such occupancy is for the purpose of protection' (*People v. Godfrey*, 17 Johns. (N. Y.) 225. * * *" (Italics ours.)

This court also said that the actual occupancy of the land prior to filing the map "* * * had no tendency to show that the state had ceded its sovereignty, as the state's right of sovereignty is not to be taken away by implication."

In the case at bar, the government made no attempt to comply with the condition by filing the map, and counsel, therefore, seek to rely on section 1 of the act of February 24, 1891, which does contain a cession of jurisdiction for the limited purposes, the entire act being attached hereto as Appendix "B."

In construing this act two things are apparent.

First: The government did not intend to divest itself of the sovereign right of taxation because section 2 of the act (section 8109, Rem. Rev. Stat.) expressly exempts from taxation the land itself and the *appurtenances necessary for the purposes mentioned.*

Applying the rule of strict construction the intent of the legislature is shown to preserve the right of taxation as to private persons, their businesses and property as was done in the case of the express cession of jurisdiction over lands for Rainier National Park. (8110, Rem. Rev. Stat.)

Secondly: The legislature did not cede "exclusive jurisdiction." The word used was simply "Jurisdiction."

In such a case the reasoning of Mr. Justice Bradley in the "Arthur Kill" case applied: That the Federal government, not desiring exclusive jurisdiction, acquired only concurrent jurisdiction. It may exercise this jurisdiction to the full extent necessary to accomplish its purpose, but without extinguishing the state's sovereignty.

In the early case of *In re Kelly*, 71 Fed. 545, the decision turned upon the omission in the state act of the word "exclusive."

The question of the jurisdiction enjoyed by the Federal government over lands purchased by it with the consent of the state of Wisconsin and used for

a national home for disabled soldiers, was squarely presented.

The court avoided deciding the question of whether or not the state of Wisconsin had authority to divest itself of its sovereignty over lands which the Congress was not specifically authorized to govern by article 1, section 8, of the Federal Constitution by deciding that as a matter of fact, the Wisconsin act ceded less than exclusive jurisdiction.

This construction was made necessary simply because the state act omitted the word "exclusive." The court said:

"* * * *That it was not the legislative intent to abdicate all powers appears from the omission in the act of the word 'exclusive.' It simply grants 'jurisdiction over the several tracts' purchased. In the general sense, jurisdiction is not in its nature exclusive, but is concurrent. Com. v. Hudson*, 11 Gray, 64."

"* * * *Reading the Wisconsin act in the light of this rule, and in the view that the purpose was not one for which exclusive legislation was prescribed, either by the constitution or by congressional enactments, the omission of the word 'exclusive' or some equivalent term is material, and must be interpreted as ceding—that is, yielding or surrendering—to the United States such jurisdiction as Congress may find necessary for the objects of the cession and for the exercise of which there must be clear enactments to that end within its powers.* * * *" (Italics ours.)

And again the court said that to interpret a state act ceding only *jurisdiction* as ceding *exclusive jurisdiction*, would require

"* * * *terms of exclusion to be inferred, and would reverse the strict rule above indicated. It would further give an effect to the act against the apparent intention of Congress, and opposed to the intention, and possibly beyond the powers, of the state legislature. The inmates and any inhabitants of the tract are otherwise placed without the protection of local laws, and without civil laws or privileges. I cannot believe that such construction is either just or permissible.*" (Italics ours.)

On page 549 the court stated the rule to be that legislative consent operates as a complete cession only as to objects which are distinctly specified in clause 17, section 8, article 1 of the Federal Constitution, and "* * * cannot be held to so operate, *ipso facto*, for objects not expressly included therein * * *."

The court then said that the power of Congress to extend its right to exercise exclusive jurisdiction under the guise of "needful buildings" was not presented in the record, but quoted the following extract from the opinion of the supreme court of the United States, in *New Orleans v. United States*, 10 Pet. 662, 737.

"'Special provision is made in the constitution for the cession of jurisdiction from the states over places where the Federal government shall establish forts or other military works. And it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction.'"

Following this quotation, the court in the *Kelly* case said:

"But, whatever may be the rule pronounced when that question arises, it appears indisputable that all state jurisdiction is not excluded from every parcel of land purchased by the general government in a state with legislative consent, irrespective of its use; and, therefore, that if the purpose is not one of those distinctly named in this clause of the constitution, the act of Congress which provides for the purchase and requires the legislative consent must in some unequivocal terms declare that exclusive jurisdiction is intended and necessary for the proposed use, or at least the purpose stated must be one of which it is manifest that any exercise of coordinate or other jurisdiction would be incompatible therewith. (Italics ours.)

"* * * In no sense do these enactments intend works or establishments for the public safety or defense, or for military purposes; nor do they contain any declaration, or suggestion even, of requirement or need of exclusive legislation over the lands purchased and employed for the homes; nor is there any provision which is incompatible with the operation of the civil and criminal laws of the locality aside from the regulations mentioned. * *"

In the case at bar, the same reasoning applies. The lands are not necessary for public safety, defense or military purposes; nor is there any requirement or need of exclusive legislation on the part of the Federal government.

The court was influenced in deciding the *Kelly* case by the prompt action of Congress to meet the effect of the decision of the supreme court of Ohio in the early case of *Sinks v. Reese*, 19 Ohio State 306.

The Ohio court there considered an act ceding

lands to the Federal government for a soldiers' home, as ceding "exclusive jurisdiction." To avoid disenfranchisement of inmates of the home, Congress promptly relinquished jurisdiction to the state. (16 Stat. 399, Act of Jan. 21, 1871.)

A later case and one more nearly in point as to the character of the use by the Federal government, is *Oscar Danials Co. v. City of Sault Ste. Marie*, 175 N. W. 160. In this case the supreme court of Michigan considered the question of the right of the state of Michigan to tax the personal property of a contractor whose office and principal place of business was in the county of Illinois and who was present in the state of Michigan for the purpose of performing a contract with the Federal government to build a lock at the falls of St. Mary's river in that state. The supreme court of Michigan stated the question as follows:

> "Upon the main proposition as to whether the tax was rightfully laid, we are to consider whether the jurisdiction of the state extended for that purpose to any personal property situated and used on the ceded lands. If the territory is beyond the jurisdiction of the state and within the exclusive jurisdiction of Congress, as the trial court held, then the judgment is right. * * *"

In deciding this question the court was met at the outset with a prior decision. (*Willis v. Oscar Danials Co.*, 200 Mich. 19, 166 N. W. 496) in which it had held that a contractor performing a contract with the Federal government on said lands was not

under the workmen's compensation act of the state of Michigan.

But when the supreme court of the state of Michigan in the *Oscar Danials Co.* case was presented with a question of whether or not the lands theretofore ceded by the state to the Federal government for the ship canal were without the jurisdiction for tax purposes, it decided the case quite differently.

It was pointed out that in the *Military Reservation cases*, such as *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, there was a cession of "exclusive jurisdiction."

The supreme court of Michigan thereupon decided that the state of Michigan had not divested itself of its sovereignty and that the lands were within the state so that the state could tax persons doing business or living thereon.

In so holding the court said:

"In the case at bar, there is not, in terms, as there was in the case of the Ft. Leavenworth Reservation, a cession to the United States of exclusive jurisdiction,

* * * * * *

" * * There was no occasion for the state to cede exclusive jurisdiction to the United States, no apparent reason for denying to the state such jurisdiction, legislative and other, as did not interfere with the control by the United States of the property transferred for the purposes of the transfer.*

"*We construe the grant itself as a cession of less than exclusive jurisdiction*, and the proviso as it was construed in *Willis v. Oscar Danials Co.*, *supra*. In this view, the ceded territory is not out of the state of Michigan so far as the operation of its tax laws is concerned, but is within the state. The tax levy in question was properly made, and the tax was a lawful one." (Italics ours.)

In the case at bar, the Federal government has required appellant to submit to the jurisdiction of the department of labor and industries and he actually paid premiums into the workmen's compensation fund and received the benefit of the workmen's compensation act.

The decision of the supreme court of Michigan is most persuasive in view of the fact that the Michigan authorities (being authorized so to do by the legislature), had conveyed the canal with all buildings and public works thereon to the government.

Whereas, in the case at bar, the Federal government is simply using state lands, title to which remains in the state.

The case of *Palmer v. Barrett*, 162 U. S. 399, involved an act of the New York legislature ceding "* * * the jurisdiction of this state * * *" rather than "exclusive jurisdiction." In holding that the state retained jurisdiction, however, the court relied upon a provision that the land should revert, if the specified use ceased, and the fact that the government had made a lease of a portion of

the grounds which required the city authorities to patrol and police them.

In the case at bar, all contracts require the lands to be under the care of the state in such matters.

The rule as to the capacity in which the Federal government holds lands acquired by condemnation is well stated in *Barrett v. Palmer*, 31 N. E. at page 1018, as follows:

"* * * The power of the Federal government to acquire lands within a state for governmental purposes cannot be so exercised as to dismember the state, and separate a part of its territory from its jurisdiction. *When the lands are acquired by the exercise of the power of eminent domain, the United States becomes simply an ordinary proprietor, and the jurisdiction and authority of the state over the lands remain unchanged, except so far as their use for the purpose of executing the powers of the general government necessarily removes them from the domain of state authority.* * * *" (Italics ours.)

It is apparent that neither of the general acts of Washington consenting to the purchase of lands by the Federal government were intended to apply to a project such as that involved in the case at bar. Neither act authorized the Federal government to acquire lands from the state (as was the case in Michigan). This was decided in *State ex rel. Bussell v. Calvert*, 33 Wash. at page 390.

Both acts were discussed in that case. The court after pointing out that the consent was given strictly in accordance with the terms of clause 17,

section 8 of article 1, of the Federal Constitution, construed the acts strictly and said:

"* * * We do not think that it can reasonably be said that, when the legislature granted to the United States the *consent* of the state to acquire, by purchase or by condemnation, land from individuals or bodies politic, *within this state*, for specified purposes, they intended thereby to grant consent to purchase lands *from the state*. If such was their intention, we think they would have expressed it in plain and unequivocal language."

To ascertain the intent of the legislature (the project being on state lands, and privately owned lands being only incidental thereto) we must, therefore, look further.

OTHER STATUTES OF THE STATE OF WASHINGTON CONTEMPLATE A USE ONLY BY THE FEDERAL GOVERNMENT WITH RETENTION OF JURISDICTION AND A REVERTER TO THE STATE

The applicable statute is also pointed out in *Bussell v. Calvert*, 33 Wash. at page 386, as the act of March 20, 1890 (Laws of 1890, page 428). Referring to this act, the court said in the *Bussell* case at page 386:

"By an act of the legislature approved March 20, 1890, the state granted to the United States the *use* of any tide lands belonging to the state and adjoining and bordering on any tract, piece, or parcel of land held or reserved by the government of the United States for the purpose of erecting and maintaining thereon forts, magazines, * * * and other needful buildings, so long as the upland adjoining such tide lands shall continue to be held by

the government of the United States for any of the public purposes therein mentioned. This act also provides that, whenever the government of the United States shall cease to hold for public purposes any such tract, piece, or parcel of land, *the use of the tide lands bordering thereon* shall revert to the State of Washington. Laws 1890, p. 428.

"It will be observed that this act simply granted to the government of the United States the *use* of tide lands belonging to the state, upon the conditions, and for the time therein specified. *It does not seem to contemplate a conveyance of an estate in fee, but rather an easement of an indefinite duration.* * * *" (Italics ours.)

This act, as amended by chapter 110, Laws of 1909, to include other aids of navigation, is section 8116, Rem. Rev. Stat. It was passed at the very session of the legislature which enacted the general act of January 23, 1890, and shows that the state simply granted to the Federal government the use of its lands with a clause providing that the use shall revert to the state in the event the uplands cease to be held for the purposes intended.

Section 8118, Rem. Rev. Stat., provides that upon proper application *an easement* may be granted to the United States. Section 8119, Rem. Rev. Stat., provides for a reservation whenever the United States shall cease to hold and use any uplands for the purposes mentioned.

It has been seen that where a reversionary right is retained by the state, the courts have held that exclusive jurisdiction is not ceded.

The Coulee project is, also, a power and irrigation project. In so far as it is a power project, it is not governmental at all, and partakes of the nature of private business, which will ultimately be conducted either by the state itself, or by a private corporation acting under the laws of the state.

In so far as it is an irrigation or a reclamation project, the function is not strictly governmental, but one exercised for the general good of the people and in aid of the government's proprietary interests.

Twin Falls Canal Co. v. Foote, 192 Fed. 583.

As it was pointed out by the court in *Six Cos. v. De Vinney*, 2 Fed. Supp., at page 698, the Reclamation Law, under which the Secretary of the Interior acts, * * * comprehends that its purposes will be carried out under national direction, but, subject thereto, *always without relinquishment of state jurisdiction.*"

The same court in the same case pointed out that under the Reclamation Law there was authority to establish townsites on these projects "* * * *subject to local state jurisdiction.*" (Italics ours.)

The same court also pointed out, in this same case, that if it were assumed that a dam, power plant and appurtenant works were needful buildings, it could not be that this would authorize exclusive jurisdiction over hundreds of miles of adjacent territory.

The Secretary of the Interior, under the Federal act, has power to acquire any lands necessary for such a project or for the purpose of being benefited by the project. These lands will be held by the government in its proprietary capacity, but will remain under the jurisdiction of the state. The Secretary of the Interior would have no authority to assume exclusive jurisdiction over them for the Federal government, if he tried.

The rights of the Federal government as to power and irrigation projects, and as to the Columbia River Basin project, particularly (section 7416-1, Rem. Rev. Stat.), are covered by sections 7408 to 7416, Rem. Rev. Stat.

Section 7408 gives the right of eminent domain to acquire lands or property for such a project.

Section 7410 provides for notice of investigation by the Federal government, during which investigation, its right to use the waters in this state will be protected.

Section 7411 covers the subject of the title which may be acquired by the Federal government and specifically provides that when all conditions are complied with, title to the beds and shores of any navigable lake or stream to be utilized for such projects shall vest in the United States only "* * * *to the extent necessary for the maintenance, operation and control of such reservoir or other irrigation works.*" (Italics supplied.)

Section 7412 provides that on completion of such a project, the filing of a plat with the Commissioner of Public Lands is necessary before any reservation shall ripen into a grant.

Section 7416 grants the right, "* * * to construct and maintain dams and works incident thereto over, upon and across the beds of rivers of the State of Washington * * *," and specifically provides "* * * for an *easement of necessary portions of the beds of* such rivers." It is specifically provided that all rights under this easement shall be forfeited and "* * * revert to the state * * *" in the event of failure to use such dams and works for a continuous period of two years.

It is apparent that section 8108, Rem. Rev. Stat., relied upon by appellant, was not intended to and does not apply to the Coulee Dam project. It is also apparent that the state retains jurisdiction and that the Federal government acquires only what the courts have referred to as all it wants, namely, the right to use the lands for the particular purpose.

In determining such a serious question, all acts of the state legislature and of the Congress must be considered. Wherever possible such a construction should be placed on these acts as will not cause the state to lose its jurisdiction over the ceded lands, nor the inhabitants thereof, their rights and privi-

leges as citizens of the state, nor to absolve these inhabitants from their duties to the state.

State v. Allman (Tenn.), 68 S. W. (2), page 478.

The supreme court of the United States said in *Larson v. South Dakota*, 278 U. S., at page 436:

" 'But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. * * *'"

* * * * * *

"' * * * *A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished.* * * *'" (Italics ours.)

Accordingly, the word "jurisdiction," as used in compacts between states over bordering territory, is construed in a more limited sense than sovereignty.

Central Ry. Co. v. Jersey City, 209 U. S. 473.

And the state of Georgia did not acquire sovereign rights over property in Tennessee acquired with the permission of that state for railroad purposes. In *Georgia v. Chattanooga*, 264 U. S. at page 481, the supreme court of the United States said in so holding:

"* * * The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. *It occupies the same position there as does a private corporation author-*

ized to own and operate a railroad; and, as to that property, it cannot claim sovereign privilege or immunity. Bank of the United States v. Planters' Bank, 9 Wheat. 904; *Bank of Kentucky v. Wister,* 2 Pet. 318, 323; *Louisville, C. & C. R. R. Co. v. Letson,* 2 How. 497, 550; *South Carolina v. United States,* 199 U. S. 437, 463. * * *." (Italics ours.)

In the case at bar, the Federal government has acquired railroad rights of way in the State of Washington. It holds these lands as a proprietor and the lands remain within the state just as they would, if the railroad were operated by a private corporation. (Indeed it is being operated and maintained by the M. W. A. K. Company as an independent contractor.)

The Federal government does not claim sovereignty or exclusive jurisdiction over this ribbon of right of way thirty miles long and one hundred feet wide. There is a compelling reason for this: The Congress has no constitutional power to exercise exclusive legislation or jurisdiction over lands used for railroad purposes, unless in connection with a fort, or in a time of war.

Appellant's Contention That the Legislature Had Power to Cede Exclusive Jurisdiction Is Not Supported by the Authorities

Counsel for appellant, apparently realizing that the purposes for which the property was acquired, or the use of which was acquired in the case at bar, are not within the scope of clause 17 of section 1 of

article 8 of the Federal Constitution, argue that the cession contained in section 8108, Rem. Rev. Stat., should be construed as a cession of sovereignty.

In the first place, counsel overlook the great difference between "jurisdiction" and "exclusive jurisdiction." At the most, if section 8108, Rem. Rev. Stat., applies, the United States received only concurrent jurisdiction (the purposes not being strictly within clause 17).

Counsel seeks to support his contention by citing language from *Ft. Leavenworth v. Lowe*, 114 U. S. 525; and *Concessions Co. v. Morris*, 109 Wash. 46. However, both of these cases involved lands ceded for purposes of a fort; strictly within the scope of clause 17. The cases must, of course, be read in light of the facts.

The *Concessions* case involved a special act ceding "*exclusive jurisdiction*" to particularly described lands for purposes of a military reservation, the terms of which were accepted and complied with by the Federal government.

It has already been remarked that the court in the *Ft. Leavenworth* case emphasized the necessity of the cession being for *one of the enumerated and specific objects of clause 17, before the cession would operate to give the United States exclusive jurisdiction.*

The reason is plain; the state can only abdicate its sovereignty where the United States has author-

ity to assume sovereignty. The United States may not exercise sovereignty over the property adjacent to the Columbia river, except for the purposes specifically mentioned in clause 17, and the operation of a power plant and irrigation project is clearly not one of them.

A case which is in point is: *In re O'Conner*, 37 Wis. 379. In this case, referring to a purchase made for a purpose within clause 17 and with the consent of the state, the Wisconsin court said on page 384:

"* * * When the purchase is made in this manner, and for such an object, then *Congress may, if it sees fit to do so, extinguish all state authority and jurisdiction over the place so acquired, and vest exclusive jurisdiction over it in the Federal courts.* * * *" (Italics ours.)

Again the same court said on page 385:

"* * * *And even in that case, if Congress has not exercised its exclusive right of legislation over the place, the jurisdiction of the state to support and maintain its laws, and to punish crimes committed within its acknowledged limits, will be asserted and maintained.* * * *." (Italics ours.)

It appearing that the legislature of Wisconsin had attempted to cede jurisdiction for a purpose not clearly within the scope of clause 17, the Wisconsin court said at page 387:

"* * * *True, it appears that the legislature by ch. 275, P. and L. Laws of 1867, attempted to cede to the United States jurisdiction over the lands upon which the national home was to be located; but if the United States did not actually acquire*

*these lands as a sovereign power, in the mode and for the purpose authorized by the constitution, this act of cession by the legislature is void. For it is not competent for the legislature to abdicate its jurisdiction over its territory except where the lands are purchased by the United States, for the specific purposes contemplated by the constitution. When that is done, the state may cede its jurisdiction over them to the United States; and, should Congress see fit to exercise its exclusive right of legislation over the place, the state jurisdiction would be completely ousted. * * *".* (Italics ours.)

As Congress had created a corporation to manage the Soldiers' Home involved in the *O'Conner* case, the court said at page 389:

"* * * *Congress might, with the consent of the state, purchase land for an arsenal, and exercise full and absolute sovereignty over the ceded territory. But, suppose Congress should incorporate a company with power to build and maintain an arsenal for the manufacture and storage of arms and other munitions of war, would the case stand upon the same ground, and would the implication arise that the state had lost jurisdiction over the arsenal belonging to the corporation? * * *"* (Italics ours.)

The holding of the *O'Conner* case is, in effect, followed in *Clarke v. County of Milwaukee*, 9 N. W. 782.

In *Mallory v. Wheeler*, 151 Wis. 136, the supreme court of Wisconsin referred to: *In re O'Conner*, 37 Wis. 379, as holding:

"* * * that it was not competent for the legislature of Wisconsin to abdicate its jurisdiction

over this territory except where the lands are purchased by the United States for the specific purposes contemplated by the constitution." (Italics ours.)

In *Illinois Central Railroad vs. Illinois*, 146 U. S. 387, at page 453, the supreme court of the United States considered the authority of the state to divest itself of its jurisdiction of lands under navigable waters. The court said:

"* * * A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. *The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.* In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State." (Italics ours.)

Article XXIV of our constitution specifically fixes the boundaries of the State of Washington.

No provision is made for changing these boundaries or altering the territorial limits.

Article XXV, which consents to exclusive legislation by Congress, limits that consent to the specific purposes mentioned in clause 17 with a further proviso requiring a filing of an accurate plat or map with "* * * a description by metes and bounds * * *."

By the fourteenth amendment to the constitution of the State of Washington it is provided that:

"The power of taxation is never to be suspended, surrendered, or contracted away. * * *"

Construing section 8108, Rem. Rev. Stat., in connection with the constitutional limitations and the other statutes of the State of Washington, it is apparent that it was not intended to apply and could not apply to either tide or shorelands or section 36, which is the section of school lands belonging to the State of Washington necessarily used by the government in connection with the Coulee Dam project.

As to lands which had been in private ownership and which were necessarily acquired for the project, title to the same rests in the United States government or in the state in trust for public purposes and legislative jurisdiction remains in the state, the Federal government having such jurisdiction only as may be necessary to carry out the projects.

CONCLUSION

Counsel for appellant apparently makes the extremely narrow point that the particular part of the work on the dam and power plant performed by appellants was done on lands purchased by the government above high water mark, tacitly admitting that other portions of the work upon the dam and power plant would have to be performed on tide and shorelands, title to which rests in the state.

Likening the Coulee Dam project to a building, this argument would be that a contractor building one wing of the building would be in the State of Washington and the contractor building another wing would be outside of the state.

If authority is needed to refute this argument, it will be found in each and every case cited by appellants, for they all involve reservations of definite boundaries used by the government in connection with the maintenance of forts or buildings permanently necessary for occupation by the government.

It is admitted that there still is no reservation by metes and bounds. Land is still being acquired as it becomes necessary.

Appellants in the cases at bar were required to submit to the workmen's compensation law of the State of Washington. As the supreme court of Oregon pointed out in *Atkinson vs. State Tax Commission*, 24 Ore. Adv. Sheets, at page 551, it seems rea-

sonable to assume that the Federal officials understood that the land included in the project was not under the exclusive legislative jurisdiction of the United States. Otherwise, they would not have required the contractors to provide state workmen's compensation and would have required the contractors to provide Federal employees' compensation under U. S. C. A. 5, section 751, as in the case of *Webb vs. White Engineering Corporation* (Ala.), 85 So. 729.

The facts in the case of *Silas Mason Co. vs. Tax Commission of the State of Washington*, now on appeal to this court as No. 773, which are made a part of the record in this case by stipulation, show that in subsequent contracts, the Federal officials went further and required the contractors to submit to legislative jurisdiction of the state in respect to school facilities, police protection, sanitation and, in short, to submit to the jurisdiction of all regularly constituted state and county authorities.

It is submitted that the Federal government has not only failed to assume exclusive jurisdiction but has indicated in every way possible that it does not wish exclusive jurisdiction and does not wish to deprive the residents of such a vast area of the right to vote and the enjoyment of the privileges of citizens of the State of Washington.

It is therefore submitted that the judgment of

the supreme court of the State of Washington should be affirmed.

Respectfully submitted,

G. W. HAMILTON,
Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

Attorneys for Appellees.

APPENDIX "A"

(Laws of Washington for 1889-90, page 459)

CONSENTING TO THE PURCHASE OF LANDS BY THE UNITED STATES

AN ACT giving the consent of the Legislature of the State of Washington to the purchase and reservation by the United States of land within this State for public purposes, and expressing an emergency.

Be it enacted by the Legislature of the State of Washington:

Section 1. That the consent of the legislature of the State of Washington be and the same is hereby given to the purchase, by the government of the United States or under the authority of the same, of any tract, piece or parcel of land from any individual or individuals, bodies politic or corporate, within the boundaries of this state, for the purpose of erecting and maintaining thereon armories, arsenals, fortifications, magazines, navy-yards, dock-yards, custom-houses, light-houses and other needful public buildings or establishments whatsoever; the consent herein and hereby given being in accordance with the provisions of the seventeenth clause of the eighth section of the first article of the constitution of the United States, and with the acts of Congress in such cases made and provided. And like consent of the legislature of the State of Washington is hereby given in the cases of all such tracts or parcels of land as have been heretofore pur-

chased by the government of the United States, or which have been or may hereafter be reserved by the said government, out of any public land belonging to the United States, for any of the purposes before mentioned: *Provided*, That a sufficient description by metes and bounds and an accurate plat or map of each such tract or parcel of land be filed in the proper office of record in the county in which the same is situated; together with copies of the orders, deeds, patents or other evidences in writing of the title of the United States: *And provided, further*, That all civil process issued from the courts of this state, and such criminal process as may issue under the authority of this state against any person charged with crime, in cases arising outside of such purchases or reservations, may be served and executed thereon in the same mode and manner and by the same officers as if the consent herein given had not been made.

Sec. 2. In order to facilitate the operations of the government of the United States in the defense and proper lighting of the coasts of this state, and in continuing works of public improvement undertaken by the government of the United States, this act shall take effect immediately upon its passage.

Approved January 23, 1890.

APPENDIX "B"

(Laws of Washington for 1891, page 31)

CEDING JURISDICTION TO THE UNITED STATES

AN ACT to cede the jurisdiction of the State of Washington to the United States of America over land needed for the improvement of rivers and harbors, and for the purchase and condemnation thereof.

Be it enacted by the Legislature of the State of Washington:

Section 1. That the consent of the State of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy yards, naval station, or other needful buildings authorized by any act of Congress, and all deeds, conveyances of title papers for the same shall be recorded, as in other cases, upon the land records of the county in which the land so acquired

may lie; and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or tracts, legal divisions or subdivisions of any public land belonging to the United States which may be set apart by the general government for any or either of the purposes before mentioned by an order, patent or other official document or papers describing such land; the consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the constitution of the United States, and with the acts of congress in such cases made and provided, and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: *Provided*, That this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein in the same manner and with like effect as though this assent and cession had not been granted,

Sec. 2. The tracts, pieces or parcels of land so acquired or set apart, together with the tenements

and appurtenances for the purposes before mentioned, shall be held exempt from taxation by the State of Washington.

Approved February 24, 1891.

APPENDIX "C"

(Laws of Washington for 1890, page 386)

GRANTING CERTAIN LANDS TO THE UNITED STATES

AN ACT granting to the United States, for public purposes, the use of certain tide-lands belonging to the State of Washington.

Be it enacted by the Legislature of the State of Washington:

Section 1. That the use of any tide-lands belonging to the State of Washington, and adjoining and bordering on any tract, piece or parcel of land held or reserved by the government of the United States for the purpose of erecting and maintaining thereon forts, magazines, arsenals, dock yards and other needful buildings, be and the same is hereby granted to the United States so long as the upland adjoining such tide-lands shall continue to be held by the government of the United States for any of the public purposes above mentioned: *Provided*, That this grant shall not extend to or include any lands covered by more than four fathoms of water at ordinary low tide: *And provided further*, That whenever the government of the United States shall cease to hold for public purposes any such tract, piece or parcel of land, the use of the tide-lands bordering thereon shall revert to the State of Washington.

Approved March 20, 1890.